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No. 934

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES GILBERT GLASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1960 (Pet. 6a). The petition for a writ of certiorari was filed on May 13, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging a sale of narcotics with knowledge that they had been imported contrary to law stated an offense under 21 U.S.C. 174, although not expressly charging that their importation had in fact been contrary to law.

2. Whether identification of petitioner's voice and the attendant circumstances were sufficient to warrant admissibility of a telephone conversation between an agent and petitioner arranging a narcotics sale.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
>
> * * *

STATEMENT

The second count of an indictment returned in the United States District Court for the Northern District

of Indiana (R. 2)[1] charged petitioner and Emma Johnson with the sale, etc., of a quantity of heroin—

> * * * after said quantity of heroin hydrochloride had been imported into the United States and knowing said quantity of heroin hydrochloride to have been imported into the United States contrary to law, in violation of [21 U.S.C. 174].

The jury found petitioner guilty and he was sentenced to imprisonment for 20 years (R. 27-28). The conviction on that count was affirmed by the court of appeals (Pet. 1a-5a).[2]

Pertinent evidence adduced at the trial may be summarized as follows:

On the evening of July 7, 1959, narcotics agent Johnson and McDaniels, a special employee of the Bureau of Narcotics, drove to Gary, Indiana. From Gary they made several telephone calls to petitioner's Chicago number, Oakland 4-4499 (R. 3). On the third call, at about 9:30 p.m., the agent and the special employee both listened to the receiver at the same time (R. 3, 4-5; Tr. 15-16, 60-61). A person who said he was "Gilbert" (petitioner's middle name) answered. Agent Johnson recognized the voice as that of petitioner, with whom he had spoken previ-

[1] "R." refers to appellant's appendix in the court of appeals. "Tr." refers to the transcript of the trial testimony which the government is filing with the Clerk of this Court.

[2] Petitioner was also found guilty and sentenced to 5 years on count 1 of the indictment, charging a sale of heroin not from the original stamped package in violation of 26 U.S.C. 4704(a), but that conviction was reversed by the court of appeals (Pet. 2a) and is not in issue here.

ously on July 1, 1959, for about three hours (R. 3, 5; Tr. 16-18, 61-62). The agent stated that he wanted to get some "stuff", and petitioner promised to deliver a quantity at 14th and Adams Streets within half an hour. At about 10:50 p.m., petitioner met the agent and the special employee (R. 3, 5, 7; Tr. 16-17). Petitioner offered to sell three "pieces" for $240. After the agent paid petitioner with marked bills, petitioner directed him to go to 1409 Adams Street. There the defendant Emma Johnson gave the agent a tinfoil package containing heroin (R. 4, 6; Tr. 34). Agent Johnson then met petitioner, who instructed him how to dilute the heroin for further sale (Tr. 40-43).

Petitioner was arrested on July 10, 1959. At that time five $20 bills, part of the marked money used by the agent in purchasing the heroin, were recovered from petitioner's person (R. 6; Tr. 141-142).

Testifying on his own behalf, petitioner denied receiving $240 from agent Johnson for a narcotics purchase. He also denied sending the agent to defendant Emma Johnson for the purpose of obtaining narcotics (R. 10, 12, 13). Emma Johnson testified that agent Johnson was not telling the truth when he stated that he visited her house and obtained narcotics from her (R. 8-9).

ARGUMENT

1. There is no merit to petitioner's contention that count 2 failed adequately to allege that the narcotics had been imported contrary to law. The indictment alleged (a) that the narcotics had been imported and

(b) that petitioner knew that they had been imported contrary to law. That the narcotics had been imported contrary to law was necessarily implicit in the allegation that petitioner had knowledge of that fact, for an accused could hardly know that narcotics had been illegally imported unless they had been. *Brown* v. *United States*, 222 F.2d 293, 296 (C.A. 9); *United States* v. *Rodgers*, 218 F.2d 536, 537 (C.A. 5). Petitioner could not, and does not, claim to have been misled. The indictment contained all the elements of the offense so that he could be prepared to meet it and would be able to plead a former acquittal or conviction if future proceedings were brought against him for the same offense. Cf. *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Debrow*, 346 U.S. 374, 378. Substantially identical indictments have uniformly been held to state an offense under 21 U.S.C. 174: *Brown* v. *United States*, *supra*; *United States* v. *Rodgers*, *supra*; *Rodriguez* v. *United States*, 218 F.2d 810 (C.A. 5); *United States* v. *Bailey* (C.A. 7, No. 12,810, decided April 13, 1960).[3]

2. Petitioner's contention that evidence of his telephone conversation with agent Johnson was inadmissible (Pet. 7) is likewise without merit.

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[3] *United States* v. *Cook*, 17 Wall. 168, relied on by petitioner (Pet. 6), is not in point. It merely recognizes that, if a statute contains an exception in its enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be clearly described if the exception is omitted, an indictment founded on the statute must allege enough to show that the accused is not within the exception. Here the statutory language was followed and no exception was omitted.

Petitioner relies upon Judge Duffy's dissent in *United States* v. *Washington*, 253 F. 2d 913, 917 (C.A. 7),[4] in which he found it unbelievable that two agents and another person all simultaneously listening to a 35-word, 12-second conversation at one telephone receiver, none of whom had previously heard the speaker's voice, could later have identified the voice as having been that of the accused. In this case, however, in contrast to the facts in *Washington*, the agent had prior knowledge of petitioner's voice; the conversation was fairly long in arranging the details of the meeting; and only two people were listening at the receiver. Moreover, there was extensive corroboration of the identification of petitioner's voice, including the facts that the call was placed to petitioner's telephone number; that, when answering, the speaker identified himself by petitioner's middle name; and that petitioner met the agent as arranged in the telephone conversation. Cf. *United States* v. *Carr*, 219 F. 2d 876, 878-879 (C.A. 7); *United States* v. *McCartney*, 264 F. 2d 628, 631 (C.A. 7), certiorari denied, 361 U.S. 845; *Fabacher* v. *United States*, 84 F. 2d 602, 604 (C.A. 5).

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[4] Reversed because of insufficiency of the evidence by this Court, 357 U.S. 348.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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